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OALJ Nos.: 1999-LHC-2296
2001-LHC-1624

OWCP Nos.: 18-66243
18-69957

In the Matter of:

Rosario Giacalone,

Claimant,

vs.

Matson Terminals, Inc.,

Respondent,

and

Marine Terminals Corporation,

Majestic Insurance Company,

Respondents,

and

Director, OWCP,

Party-in-Interest

Before:

William Dorsey,
Administrative Law Judge

DECISION AND ORDER

I. Background

Rosario Giacalone ("Claimant") has been employed as a longshore worker for over 30 years, and is now 69 years old. He filed two separate claims for permanent partial disability benefits, both alleging binaural hearing loss attributable to exposure to industrial noise, under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. ("Longshore Act" or "Act"). The first claim was based on an audiogram performed on March 16, 1995, following employment with Matson Terminals, Inc. ("Matson Terminals"). Claimant later filed a similar hearing loss claim against Marine Terminals Corporation ("MTC") and Majestic Insurance Company ("Majestic")[1] based on an audiogram administered on August 25, 1998, following his employment with MTC. The Director, OWCP, intervened as a party-in-interest. The two hearing claims were consolidated, and the entire matter was set to be heard at a calendar call in Long Beach, California beginning on December 3, 2001.

Instead of a hearing, the parties asked on January 6, 2002 that they be permitted to submit to me joint Stipulations of Facts, and that I then decide the case on the record, without a hearing. The parties filed post-hearing briefs and other supplementary materials in late January and early February 2002. Based on the stipulations filed by the parties, the evidence presented, and the arguments made, I make the following findings in this case. Any testimony discussed is deposition testimony, not trial testimony.

II. Stipulations

The parties have collectively stipulated to the following:

1. The parties are covered by the provisions of the Act.

2. Claimant was exposed to injurious noise on March 15, 1995, while working as a supervisor for Matson Terminals, and again on August 24, 1998, while working for MTC.

3. The audiograms of March 16, 1995 revealing a 36.6% bilateral hearing loss and August 25, 1998 revealing a 40.6% bilateral hearing loss were valid, credible and reliable.

4. Claimant was a maximum earner on March 15, 1995 and August 24, 1998, and is entitled to the maximum compensation rate in effect at that time.

5. Claimant timely filed his claims for compensation against Respondents.

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[1] I refer to Matson Terminals, MTC and Majestic collectively as "Respondents."

6. Respondents had timely notice of the injury sustained by Claimant.

7. Claimant's attorney is entitled to $10,000 in fees and costs for his representation of Claimant, which is to be paid for by one or all of the responsible employers.

8. Claimant is entitled to a sum of $2,750 for self-procured medical care, which is to be paid for by one or all of the responsible employers.

9. Claimant will require future medical care in the form of further hearing aids and batteries, which is to be paid for by one or all of the responsible employers.

III. Issues for adjudication

The issues presented to me for adjudication are:

1. The extent of Claimant's disability;

2. Identifying the determinative audiogram;

3. Identifying the last responsible employer;

4. Whether the responsible employer is entitled to Section 8(f) relief from the "Special Fund";

5. Whether the credit doctrine is to be applied, and if so, how;

6. Which employer is liable for medical treatment; and

7. Which employer is liable for the stipulated attorney fees and costs.

IV. Findings of fact and conclusions of law

Claimant worked as a chief supervisor with Matson Terminals for approximately ten to twelve years before March 16, 1995. Matson Ex. 12 at 216-217. During that time, he was regularly exposed to noise from refrigerated containers, forklifts, tophandlers, diesel truck engines, and railcars. *Id.* at 29.

On March 16, 1995, he had an audiogram as part of Matson Terminals' hearing conservation program. Matson Terminals Ex. 6 at 38. The March 16, 1995 audiogram revealed a 36.6% binaural hearing impairment, using the rating system found in the American Medical Association's

Guides to the Evaluation of Permanent Impairment (5th Ed.) ("AMA's *Guides*"). *Id*. at 40. On December 14, 1996, he had another audiogram for the purpose of obtaining new hearing aids, due to an increase in his hearing loss.

From May 1997 to October 1997, Claimant worked for various longshore employers until he began to work for MTC as a steady foreman in November 1997. He was exposed to noise at that job from metal against metal noises, from equipment such as overhead cranes, and engine noises from UTRs, transtainers, and tophandlers. Matson Terminals Ex. 12 at 206-212.

Dr. Murray Grossan performed another audiogram on August 25, 1998. Matson Terminals Ex. 8 at 57-67. This audiogram demonstrated a 40.6% bilateral hearing loss using the rating system from the AMA *Guides*. *Id.* Dr. Grossan found that unlike the 1995 audiogram, Claimant's 1998 audiogram was not symmetrical. While there was no change in Claimant's hearing in his right ear, there was a decrease in hearing in the left ear.

Claimant is entitled to the presumption that this increased hearing impairment is attributable to his employment with Matson Terminals and MTC, under Section 20(a) of the Act. 33 U.S.C. § 920(a). The medical evidence in this case, including Dr. Grossan's medical report, convinces me that Claimant's exposure to noise at both Matson Terminals and MTC caused his hearing loss, which is a compensable injury.

Claimant suffered a compensable injury while in the scope of his employment with Respondents. I must consider whether Matson Terminals, MTC, or both employers, are liable for this injury. The last responsible employer rule and the aggravation rule resolve the issue.

A. Aggravation Rule and Last Responsible Employer Rule

The last responsible employer doctrine states that in an occupational disease case, the employer (and its insurer) which last employed a claimant in circumstances exposing him to injurious stimuli before the date on which a claimant was aware he was suffering from an occupational disease is liable for the claimant's injuries. *Port of Portland v. Director, OWCP,* 932 F.2d 836 (9th. Cir. 1991). In hearing loss cases, the Ninth Circuit has held that liability rests with the last responsible employer to expose the injured worker "to injurious stimuli prior to the administration of the determinative audiogram." *Port of Portland*, 932 F.2d 836.

The aggravation rule provides that, where employment aggravates, accelerates, or combines with a pre-existing impairment to produce a greater disability than that which would have resulted from the original employment injury alone, the entire disability is compensable by the second employer. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1990) (relying on *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-15 (9th Cir. 1966)). This rule is meant to provide a prompt, single, complete recovery to the employee. *Id*. [citing *Strachan Shipping Co. v. Nash,* 782 F.2d 513, 517 (5th Cir. 1986)].

MTC acknowledges this decisional law, but contends it is not the last responsible employer for several reasons, all of which I find unconvincing. First, MTC claims that because the August 25, 1998 audiogram was not symmetrical,[2] the March 16, 1995 audiogram should be found to be the determinative audiogram, thereby making Matson rather than MTC liable as the last responsible employer.

I find this argument unavailing. The aggravation rule does not require that a claimant show any particular degree of aggravation, and it certainly does not require a showing of symmetry. Nor is there any requirement that the claimant demonstrate a medical causal relationship between a claimant's exposure to noise and his occupational disease. *Port of Portland*, 932 F.2d at 841. The rule requires only a showing that the last employer, by injurious exposure, could have contributed causally to Claimant's disability.[3]

Claimant's hearing worsened from 1995 to 1998, and this worsening was due at least in part, if not in whole, to Claimant's exposure to noise while in the employ of MTC. Although he testified that there may have been several factors contributing to Claimant's hearing loss, Dr. Grossan also stated that he believed that Claimant's continued work and continued noise exposure on the dock was the most likely reason for the increased hearing impairment between 1995 and 1998. Matson Terminals Ex. 14 at 269. I find the reasons given for Dr. Grossan's conclusion persuasive.

Benjamin v. Container Stevedoring Company, 34 BRBS 189 (2001) states the controlling law. Both Claimant and Matson Terminals cite it for the proposition that Claimant's injury was aggravated while working for MTC, and that MTC was the last responsible employer for purposes of determining liability.[4] As both Claimant and Matson Terminals have pointed out, the

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[2]Dr. Grossan testified that there could be several explanations for Claimant's hearing loss to be asymmetrical. First, Claimant used a hearing aid primarily in his left ear, which would have amplified the sound and caused a greater hearing loss in that ear. Matson Terminals Ex. 14 at 263-64. The hearing loss could have been caused by underlying medical factors, such as reduced circulation, Claimant's employment in the military, or even by Claimant's taking a small dose of aspirin every day following a heart attack.

[3]It should be noted that the Act "mitigates the harshness of the aggravation principle on a given employer" in two significant ways: First, Section 8(f) limits liability in "second injury" cases and shifts the remaining liability to a special industry fund; and second, an employee may not obtain a double recovery for a disability for which compensation has already been paid. *See* 33 U.S.C. 903(e); *Port of Portland*, 932 F.2d at 839 n.1; *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 520 (5th Cir. 1986).

[4]In a letter dated February 5, 2002, the District Director notes that the *Benjamin* case is on appeal to the Ninth Circuit. Furthermore, the Director suggests that the *Benjamin* case is at odds with the purpose of the Act as he interprets it because it would allow payments to be delayed based on a later audiogram rather than expedited, as Congress had intended when it

facts of *Benjamin* are quite similar to the facts here. There the injured worker had two audiograms. He had worked for different employers before each one. The Benefits Review Board ("Board") rejected the contention of the second employer and the Director that the administrative law judge should have found both audiograms to be determinative ones, making each employer liable on a proportional basis for hearing impairment caused by the different periods of employment. *Benjamin*, 34 BRBS at 191. The Board held that the second audiogram was the best measure of the claimant's hearing loss, since it reflected the decrement in hearing caused by the claimant's exposure to noise after the first audiogram, but before the second. *Id.* The Board found that only the second employer was liable for the claimant's injury.

Applying the Board's reasoning in *Benjamin*, I find that the August 1998 audiogram was the determinative audiogram. MTC is liable for Claimant's injury.

In the alternative, MTC argues that Claimant is entitled to two separate scheduled awards for occupational hearing loss, based upon two separate determinative audiograms, and that liability should be apportioned between MTC and Matson Terminals. MTC says that Claimant filed two separate claims instead of one, and that he should receive benefits for occupational hearing loss upon the presentation of the first, not the last, determinative audiogram.

The Board's *Benjamin* decision makes this argument unpersuasive as well. It is irrelevant whether Claimant filed two separate claims or one distinct claim, for Claimant's 1995 and 1998 claims were for the same injury: hearing loss due to noise exposure. *Benjamin*, 34 BRBS at 191. It is also irrelevant when the disability first began to manifest itself. The Ninth Circuit has specifically rejected the "onset of liability" test and found that full liability falls "on the carrier covering the risk at the time of the most recent injury that bears a casual relation to the disability." *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 1337 (9th Cir. 1978).

In *Cordero*, the claimant had worked for the subsequent employer, Triple A, for approximately three months before being diagnosed with a disability. The Ninth Circuit held Triple A, the subsequent employer, responsible for the entire disability because there was "a rational connection between the length of employment and the contribution to the development and aggravation of the disease." *Cordero*, 580 F.2d at 1336-37.

Claimant's steady employment at MTC exposed him to injurious stimuli, so that his hearing impairment worsened from a 36.6% loss in 1995 to 40.6% loss in 1998. Under the aggravation rule, Claimant is entitled to be compensated by one employer (MTC) for his entire disability resulting from the combination of his exposure to noise while working for Matson Terminals and MTC. This is rule is designed to avoid the complexities of apportioning liability among all

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enacted the LHWCA. Letter from John C. Nangle, Associate Regional Solicitor, to William N. Brooks, dated February 5, 2002. The Director acknowledges, as he must, that I should apply the law stated in *Benjamin* until it is overruled or reversed.

responsible employers.

As a final argument, MTC and Majestic contend that they should not be liable to reimburse Claimant for the cost of his hearing aids, which totals $2,750.00, when the hearing aids were purchased in response to his hearing loss established during the course of his employment with Matson Terminals. MTC and Majestic have provided me with no authority to support this position, however.

I believe that the last responsible employer rule covers this situation, and imposes liability on MTC and Majestic for Claimant's hearing aids – even if they were purchased before Claimant's employment with MTC. The fact of the matter is that Claimant required use of the hearing aids after his employment with MTC. Therefore, MTC would have been required to buy a set of hearing aids for Claimant whether or not he previously worked at Matson Terminals.

I find that the August 25, 1998 audiogram is the determinative audiogram, and that MTC was the last responsible employer. MTC is liable for Claimant's hearing loss injuries.

B. MTC's Entitlement to Section 8(f) Relief

On January 20, 2000, Majestic, on behalf of MTC, timely filed an application for Section 8(f) relief. The District Director denied the application because the threshold issue of injury was in dispute.

Matson Terminals, MTC and Majestic now submit that MTC and Majestic are entitled to Section 8(f) relief for preexisting permanent disability and that their liability should be limited to the difference between Claimant's present binaural hearing loss of 40.6% and the preexisting 36.6% binaural hearing loss established at the March 16, 1995 audiogram.

The purpose of Section 8(f) "Special Fund" relief is to mitigate an employer's burden to pay benefits based upon a combination of a preexisting and a work related disability, to provide the employer with an incentive to hire employees with a preexisting permanent disability who are susceptible to aggravation injuries.

The March 16, 1995 audiogram establishes that Claimant suffered a 36.6% hearing impairment under the rating system found in the AMA's *Guides*; this constitutes a preexisting permanent partial disability for Section 8(f) purposes. Furthermore, the District Director, in a letter dated January 24, 2002, has said that it would not oppose an Order requiring payment from the Special Fund if MTC is found to be the last responsible employer, and permanent disability is found to be materially and substantially
greater as a combined result of Claimant's current disability with the preexisting disability. Letter from John C. Nangle, Associate Regional Solicitor, to Judge Alexander Karst, dated January 24, 2002.

I therefore find that MTC is entitled to Section 8(f) relief, and that MTC's liability should be limited to the difference between Claimant's present binaural hearing loss of 40.6% and the preexisting 36.6% hearing loss established in 1995.

C. The credit doctrine

Finally, there is an issue about whether the responsible employer is entitled to a credit in the amount of $8,411.73, which has already been paid to Claimant based on a preexisting hearing impairment of 10.6%, as diagnosed by Dr. Grossan in December 1984.

Under the credit doctrine, the responsible employer is entitled to a credit for monies actually received by a claimant for his prior injury. The doctrine furthers the important policy of avoiding double recoveries by a claimant.

Based on a telephonic conference that I had with the parties on January 25, 2002, counsel for Matson Terminals distributed a letter on February 4, 2002 in which he indicated that Claimant and Matson Terminals had stipulated to a credit in the total amount of $8,411.73. During the conference, counsel for MTC and Majestic indicated that they were seeking Section 8(f) relief, and that any credit would work to the benefit of the Special Fund under *Director, OWCP v. Bethlehem Steel Corp*., 868 F.2d 759 (5th Cir. 1989). Counsel for MTC and Majestic therefore indicated that her client had no interest in the credit issue. In a letter dated February 5, 2002, the Director stipulated that the credit be that amount, but did not stipulate to the materiality or reliability of the early audiograms.

In the *Bethlehem Steel* case, the Ninth Circuit addressed the issue of whether the employer or the Special Fund receives the benefit of a credit. The court held that where an injury falling within the provisions of Section 8(f) materially increases a preexisting permanent partial disability of an employee, and where the compensation due exceeds 104 weeks' compensation, a credit shall first reduce the total award (*i.e.,* the credit should be applied first to the fund rather than to the employer). *Bethlehem Steel*, 868 F.2d at 762-63.

Because the parties stipulated to the amount above, I find that the credit of $8,411.73 shall be applied first to the Special Fund, and if any money is left over, the remainder shall be applied to MTC's liability.

V. Order

It is hereby **ORDERED** that:

1. MTC shall pay Claimant permanent partial disability compensation for Claimant's hearing loss. MTC is entitled to relief under Section 8(f) as described above. Furthermore, MTC is entitled to any money credit that might be left over after $8,411.73 has been applied to the Special Fund.

2. MTC shall pay interest on each unpaid installment of compensation from the date compensation actually became due until the date of actual payment. The rate of interest shall be that set in 28 U.S.C. § 1961, compounded annually as that statute requires.

3. MTC remains liable for all reasonable and necessary medical expenses incurred in the future as a result of Claimant's employment with MTC.

4. MTC shall pay Claimant's attorney the stipulated amount of $10,000 in fees and expenses.

5. All computation of benefits and other calculations which must be made to carry out this order are subject to verification and adjustment by the District Director.

A
William Dorsey
Administrative Law Judge